[J-47-2022] [MO:Brobson, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CHRISTOPHER ALPINI,	:	No. 2 MAP 2022
	:	
Appellant	:	Appeal from the Order of the Commonwealth Court dated July 19, 2021 at No. 92 CD 2020 Affirming the Order of the Workers' Compensation Appeal Board dated January 15, 2020 at No. A18-0913.
v.	:	
	:	
	:	
	:	
WORKERS' COMPENSATION APPEAL BOARD (TINICUM TOWNSHIP),	:	ARGUED: September 14, 2022
	:	
Appellees	:	

CONCURRING OPINION

JUSTICE DOUGHERTY **DECIDED: May 16, 2023**

I fully join the majority opinion's statutory construction analysis of 75 Pa.C.S. §1720, as well as its holding this case falls within the provision's scope. *See* Majority Opinion at 20-25. I further join the majority's conclusion this Court's opinion in *Pennsylvania State Police v. Workers' Compensation Appeal Board (Bushta)*, 184 A.3d 958 (Pa. 2018), is applicable here. I write separately only to elaborate on why Section 319 of the Workers' Compensation Act (WCA) does not permit Tinicum Township (Township) to subrogate against claimant Christopher Alpini's third-party tort recovery.

Pursuant to *Bushta*, "for purposes of the MVFRL, Heart and Lung [(HLA)] benefits subsume WCA benefits, and thus subrogation of such benefits is barred." *Id.* at 968. I agree with the majority that our decision in *Bushta* was not bound by the specific facts of that case — where the employer was self-insured and its third-party administrator paid

the wage loss benefits directly to the employer.[1] I reiterate, however, that *Bushta*'s holding is limited — it holds only that "Heart and Lung benefits subsume WCA benefits" for purposes of the MVFRL's anti-subrogation provisions (Sections 1720 and 1722). *See id.*

We have this specific rule in this context because Sections 1720[2] and 1722[3] of the MVFRL provide an extra statutory overlay that affects an employer's subrogation rights.

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[1] I also agree with the majority's reasoning that the facts of this case are not materially distinguishable from the facts in *Bushta*: although the Claimant here was issued checks from the Township's third-party insurer for WCA benefits, like the claimant in *Bushta*, he did not keep those benefits (as he signed the checks over to the Township) and did not receive a double recovery. I differ from the majority on this point only in a semantic sense. While the majority holds "the employee cannot, as a matter of law, **receive** both HLA benefits and workers' compensation wage loss benefits[,]" Majority Opinion at 26 n.13 (emphasis added), I believe it would be more accurate to say the employee cannot "**retain**" both benefits. The HLA requires claimants to turn over "any workmen's compensation[] **received** or collected[.]" 53 P.S. §637 (emphasis added); *see also City of Erie v. WCAB (Annunziata)*, 838 A.2d 598, 605 (Pa. 2003) ("it does not necessarily follow from our affirmance of the right of a claimant to **seek and receive** workers' compensation benefits for concurrent employment that a claimant can **retain** those benefits") (emphasis in original). It therefore must be possible for HLA recipients to also "receive" workers' compensation benefits. But the majority's point is well-taken that those claimants may not **retain,** or keep, the WCA benefits.

[2] Section 1720 provides:

> In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits, benefits available under section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) or benefits paid or payable by a program, group contract or other arrangement whether primary or excess under section 1719 (relating to coordination of benefits).

75 Pa.C.S. §1720.

[3] Section 1722 provides:

> In any action for damages against a tortfeasor, or in any uninsured or underinsured motorist proceeding, arising out of the maintenance or use of a motor vehicle, a person who is eligible to receive benefits under the

(continued…)

Cf. id. (distinguishing *Wisniewski v. WCAB (City of Pittsburgh)*, 621 A.2d 1111 (Pa. Cmwlth. 1993), and *Bureau of Workers' Comp. v. WCAB (Excalibur Ins. Mgmt. Serv.)*, 32 A.3d 291 (Pa. Cmwlth. 2011), on the basis that they did not "involve[ ] the MVFRL"); *Stermel v. WCAB (City of Phila.)*, 103 A.3d 876, 884-85 (Pa. Cmwlth. 2014) (same). Sections 1720 and 1722 work in tandem: Section 1720 prevents employers from subrogating for HLA benefits paid, and Section 1722 prevents claimants from recovering the amounts they are already being paid under the HLA (namely, lost wages and medical expenses). *See* 75 Pa.C.S. §§1720, 1722; *see also* 53 P.S. §637(a) (requiring HLA recipients be paid their "full rate of salary" and "[a]ll medical and hospital bills, incurred in connection with" their work injury). This scheme prevents HLA claimants from receiving a double recovery, as they are statutorily barred by Section 1722 from recovering lost wages and medical expenses through a third-party tort action. *See Bushta*, 184 A.3d at 968 ("Claimant was precluded from recovering his lost wages and medical benefits from the tortfeasors under the MVFRL because Claimant's wages and medical benefits were fully covered by the [HLA]."); *Stermel*, 103 A.3d at 885 ("because the tort recovery cannot, as a matter of law, include a loss of wages covered by Heart and Lung benefits, Claimant did not receive a double recovery of lost wages or medical bills").[4] And just because there

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> coverages set forth in this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719 (relating to coordination of benefits) shall be precluded from recovering the amount of benefits paid or payable under this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719.

75 Pa.C.S. §1722.

[4] I agree with the majority's reasoning that "[a]s Claimant's third-party recovery from Tavern Owners was the product of a settlement between the parties, we have no way of determining based upon the record before us whether such settlement included the HLA benefits that Claimant received from Employer in violation of Section 1722." Majority Opinion at 26-27 n.14; *see also Stermel*, 103 A.3d at 885 ("Simply, Section 1722 . . . did (continued…)

may be a concurrent right to lost wages and medical expenses pursuant to the WCA does not mean a claimant receiving HLA benefits can avoid Section 1722's bar against recovering for lost wages and medical expenses; Section 1722 includes no such exception.

However, the Township argues its right to subrogation is absolute and established by Section 319 of the WCA, which provides, in relevant part:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated **to the right of the employe**, . . . against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employe[.] . . . The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement.

77 P.S. §671 (emphasis added, footnote omitted). Under Section 319, the employer is subrogated only "to the right of the employe." *Id.* But if, as explained above, the employee has no right to recover lost wages and medical expenses pursuant to Section 1722's statutory bar, there is nothing from which the employer can subrogate. *See Stermel*, 103 A.3d at 885 ("Claimant continued to be 'precluded' from recovering the amount of benefits paid under the [HLA] from the responsible tortfeasors. 75 Pa.C.S. § 1722. There can be

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not allow Claimant to recover loss of wages from the tortfeasor defendants because they were covered by the [HLA]. The record does not disclose the elements of the $100,000 Claimant received from the tortfeasor. As a matter of law, however, it was net of his [HLA] benefits."). I further note that because no party admitted liability in the settlement agreement, and the amount paid was not apportioned by percentage of liability, we have no way of knowing how much of Claimant's recovery is even attributable to the Tavern Owners' actions. *See* General Release at 1-2.

no subrogation out of an award that does not include these benefits."); *see also Bushta*, 184 A.3d at 968 (adopting the foregoing reasoning from *Stermel*).[5]

I emphasize that this is where my reasoning seems to diverge from that expressed by Justice Wecht in his dissenting opinion. I agree with the dissent that Section 319 of the WCA would typically allow for subrogation regardless of whether the third-party tort action arises out of the maintenance or use of a motor vehicle. But this Court's reasoning in *Bushta* necessitates finding that: (1) because Claimant was receiving HLA benefits, he was precluded from recovering lost wages and medical benefits pursuant to MVFRL Section 1722; (2) which means his third-party tort recovery could not include those benefits; so (3) the Township (which, per WCA Section 319, would otherwise be able to subrogate to recover to the extent WCA benefits were payable) has **no source from which it can subrogate** for the lost wages and medical benefits payable under the WCA.

The *Bushta* Court plainly held:

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[5] The Township cites *Thompson v. WCAB (USF&G Co.)*, 781 A.2d 1146 (Pa. 2001), for the proposition that subrogation is "automatic" and subrogation rights are "absolute." Township's Brief at 15-16. The Township is correct we reaffirmed in *Thompson* an employer's right to subrogation is "generally absolute." 781 A.2d at 1153. However, we did not hold in *Thompson* that an employer had a right to subrogate for workers' compensation benefits paid from a tort recovery that did not include lost wages and medical expenses. In fact, the *Thompson* Court remanded to the Commonwealth Court to determine if the employee's settlement included lost wages and medical expenses, rather than only including amounts for pain and suffering and his wife's loss of consortium (as expressly designated by the terms of the settlement agreement). *See id.* at 1154-55 (relying on *Darr Construction Co. v. WCAB (Walker)*, 715 A.2d 1075, 1080 (Pa. 1998), for the assertion the "doctrine of subrogation implies [the] need for some identity or equatability of funds"). No such remand is necessary in this case because under Section 1722, the settlement agreement cannot include lost wages or medical expenses. Moreover, contrary to *amicus* City of Philadelphia's argument, our holding today does not "contradict the prior holdings discussing the interplay between WCA and HLA benefits." Brief for *Amicus* City of Philadelphia at 19. We are not overruling any prior case law about when compensation is "payable" for purposes of the WCA or when there are concurrent rights to WCA and HLA benefits — we are simply interpreting the anti-subrogation provisions of the MVFRL.

> [The employer] ignores the fact that, like *Stermel*, the instant case is distinguishable from *Wisniewski* and *Excalibur Insurance* because it involves the MVFRL. Indeed, here, as in *Stermel*, **Claimant was precluded from recovering his lost wages and medical benefits from the tortfeasors under the MVFRL because Claimant's wages and medical benefits were fully covered by the Heart and Lung Act**. We agree with the *Stermel* court that, **for purposes of the MVFRL, Heart and Lung benefits subsume WCA benefits, and thus subrogation of such benefits is barred**.

Bushta, 184 A.3d at 968 (emphasis added).[6] In cases implicated by Section 1722, a person receiving HLA benefits "shall be precluded from recovering the amount of benefits paid or payable" under the HLA, 75 Pa.C.S. §1722, *i.e.*, they are "precluded from recovering [their] lost wages and medical benefits from the tortfeasors under the MVFRL because [their] wages and medical benefits were fully covered by the Heart and Lung Act[,]" *Bushta*, 184 A.3d at 968. And nothing in the text of Section 1722 or Act 44 would allow a claimant receiving HLA benefits to recover lost wages and medical expenses (which are fully covered by the HLA) from the third-party tortfeasor simply because they

[6] The dissent argues this reasoning was "little more than a restatement of the facts of *Bushta*, which differ from the instant case" because here, Claimant received workers' compensation checks from the insurer. Dissenting Opinion at 12. But in fact, this portion of *Bushta* addressed the employer's argument that the holdings in *Excalibur* and *Wisniewski* — where self-insured employers are required to pay both WCA and HLA benefits, two-thirds of the payments made represent WCA benefits — applied to its case. As explained above, we found that principle did not apply because neither of those cases involved the MVFRL. If that principle did apply, then *Bushta* surely would have involved the "meaningful transfer of [WCA] funds" the dissent references, as two-thirds of the benefits actually paid by the employer would have been considered WCA benefits. *Id.* at 10. But we rejected the employer's argument, not because the claimant in *Bushta* did not receive a check specifically covering WCA benefits, but because after Act 44, claimants were still barred from recovering HLA benefits under Section 1722, meaning they were barred from recovering all of their lost wages and medical benefits. *See Bushta*, 184 A.3d at 968. To read this portion of *Bushta* otherwise would result in circularity; it would be illogical for the Court to have rejected the employer's argument that two-thirds of the amount actually paid constituted WCA benefits by reasoning the injured employee was not separately paid WCA benefits.

also receive WCA benefits.[7] For these reasons, employers are barred from subrogating in this context regardless of whether they are self-insured or insured by a third-party insurer.

Justice Donohue joins this opinion.

[7] According to the dissent, after Act 44, injured employees receiving both types of benefits may recover the amount of lost wages and medical expenses covered by their WCA benefits, notwithstanding the fact Section 1722 affirmatively prohibits them from recovering the amount of lost wages and medical expenses covered by their HLA benefits (that is, **all** of their lost wages and medical expenses). *See* Dissenting Opinion at 10. But as a practical matter, when injured employees sue third-party tortfeasors, they seek damages for lost wages and medical expenses generally. They do not seek "lost wages and medical expenses as covered by the WCA" or "lost wages and medical expenses as covered by the HLA." Imagine a scenario where the MVFRL is not implicated and there are no limits on subrogation: an injured employee would not be able to recover 166.67% of his lost wages from a third-party tortfeasor just because he has a concurrent entitlement to WCA and HLA benefits, even if the employer paying the benefits is insured for workers' compensation. Tying the MVFRL back in, if a claimant receives HLA benefits, he "shall be precluded from recovering the amount of benefits paid or payable" under the HLA. 75 Pa.C.S. §1722. The amount of benefits paid or payable is full lost wages and medical expenses. While Act 44 eliminated the Section 1722 prohibition on recovering WCA benefits, it did not affirmatively grant injured employees the ability to recover lost wages and medical expenses if they are otherwise barred by Section 1722's prohibition on recovering HLA benefits.